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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ADAM BLAKE,

14 Plaintiff,

15 v.

16 UNITED STATES DEPT. OF STATE,
17 FEDERAL BUREAU OF
18 INVESTIGATIONS, UNITED STATES
19 DEPT. OF HOMELAND SECURITY,

20 Defendants.

Case No. C 07-0543 MJJ

1b
2 DEFENDANT UNITED STATES DEPT.
OF STATE'S MOTION TO DISMISS

Date: Tuesday, June 19, 2007
Time: 9:30am
Ctmm: 11, 19th Floor

19 PLEASE TAKE NOTICE that on Tuesday, June 19, 2007, at 9:30a.m., in the Courtroom
20 of the Honorable Martin J. Jenkins, United States District Judge, Courtroom 11, 19th Floor,
21 United States District Court, 450 Golden Gate Avenue, San Francisco, California, the United
22 States of America, represented by the United States Attorney for the Northern District of
23 California, through Owen P. Martikan, Assistant United States Attorney, will move the Court to
24 dismiss this case for violation of this District's Local Rules, for lack of subject matter
25 jurisdiction under Fed. R. Civ. P. 12(b)(1), and for failure to state a claim under Fed. R. Civ. P.
26 12(b)(6). The motion will be based on this motion, the evidence submitted therewith, the
27 arguments of the parties, and such other matters as may be presented to or considered by the
28 Court.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This is one of three lawsuits brought simultaneously in this District by plaintiff Adam
4 Blake, each of which assert various wrongs allegedly perpetrated by various federal officials and
5 agents. Blake asks that the Department of State give him a passport, for money damages due to a
6 detention in New York, and for money damages related to the actions of numerous federal agents
7 from several federal agencies. The allegations are too unclear to permit further clarification.

8 Blake has filed this lawsuit without including any contact information, such as an address,
9 which would permit either the Court or a defendant to contact or serve him. A party's failure to
10 include address information is a violation of this District's rules, and justifies dismissal of the
11 complaint.

12 Blake's allegations fail to state a cognizable or intelligible claim. He does not allege a
13 waiver of sovereign immunity, or a jurisdictional basis for this Court to order the State
14 Department to give him a passport. He does not allege a waiver of sovereign immunity that
15 would entitle him to money damages against the United States or any specific federal agent. He
16 does not show how his incarceration is actionable, or what the listed individuals have done to
17 him that would invoke the jurisdiction of this Court.

18 **STATEMENT OF FACTS**

19 Blake's factual allegations are unclear. He appears to want the Court to "allow" him to
20 "petition the U.S. Department of State" to send him a U.S. passport, and to declare the countries
21 to which he may not travel. He also asserts that he should be compensated because some State
22 Department employees and employees of other government agencies apparently assisted in a
23 criminal prosecution of Blake in the Southern District of New York.

24 Blake's pleadings do not provide an address; they merely state that he is homeless in
25 Santa Clara and San Mateo counties.

1
2 **ARGUMENT**

3 **I. STANDARD ON A MOTION TO DISMISS.**

4 The Court must dismiss a claim over which it lacks subject matter jurisdiction. Fed. R.
5 Civ. P. 12(b)(1); *Hooker v. U.S. Dep't of Health and Human Servs.*, 858 F.2d 525, 530 (9th Cir.
6 1988); *see also Billingsley v. C.I.R.*, 868 F.2d 1081, 1085 (9th Cir. 1989) (the court is under a
7 continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction). In
8 considering a Rule 12(b)(1) motion, the Court applies standards particular to the nature of the
9 jurisdictional challenge. If the challenge is a facial attack -- one contesting jurisdiction solely on
10 the allegations of the complaint -- the factual allegations of the complaint are presumed to be
11 true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject
12 matter jurisdiction. *See Thornhill Pub. Co. v. Gen'l Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th
13 Cir. 1979).

14 In addition, a court properly dismisses a complaint under Rule 12(b)(6) where "it appears
15 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
16 entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa*
17 *Mesa*, 886 F.2d 260, 262 (9th Cir. 1989). The court must accept as true all factual allegations in
18 the complaint, construing the complaint in the light most favorable to the plaintiff. *Scheuer v.*
19 *Rhodes*, 416 U.S. 232, 236 (1974); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).
20 "The court need not, however, accept as true allegations that contradict matters properly subject
21 to judicial notice or by exhibit. . . Nor is the court required to accept as true allegations that are
22 merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v.*
23 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

24 **II. THE COURT SHOULD DISMISS BLAKE'S COMPLAINT FOR FAILURE TO
25 INCLUDE AN ADDRESS.**

26 The Court should dismiss Blake's complaint because he does not provide an address.
27 Under this District's Local Rules, any paper that a party -- including a pro se litigant -- presents
28 for filing must include the party's address, among other information, on the first page. Local
Rule 3-4. A pro se litigant's complaint is subject to dismissal for failure to comply with this rule.

1 Local Rule 3-9(a); Local Rule 1-4. The Court may also dismiss a pro se complaint for failure to
2 notify the Court of an address change if mail directed to the pro se litigant is returned to the
3 Court as not deliverable. Local Rule 3-11. Blake's mail in this case has already been returned as
4 not deliverable. See Docket Sheet Nos. 13 and 14.

5 The address requirement is not technical. Unless Blake provides the Court and parties
6 with his address, the Court and parties cannot communicate with him, and cannot serve him.
7 This litigation cannot proceed in any kind of efficient manner, and any order entered by the Court
8 raises issues of due process because it cannot be served on the plaintiff.

9 The Court should order Blake to provide the Court and parties with a mailing address and
10 other contact information required by Local Rule 3-4 within 10 days, or face dismissal of his
11 complaint.

12 **II. THE COURT SHOULD DISMISS BLAKE'S COMPLAINT FOR LACK OF**
13 **JURISDICTION.**

14 The United States and its agencies enjoy sovereign immunity from civil liability except to
15 the extent that the United States has consented to be sued. *United States v. Mitchell*, 445 U.S.
16 535, 538 (1980). A plaintiff must plead a basis for waiver of sovereign immunity. See Fed. R.
17 Civ. P. 8(a) (stating that a pleading "shall" contain a statement of the basis for the Court's
18 jurisdiction). A lawsuit for money damages against the United States based on torts by United
19 States employees while acting within the scope of their employment must be brought under the
20 Federal Tort Claims Act, 28 U.S.C. §§1346, 2671-80. This law requires plaintiffs to file tort
21 claims before the relevant federal agency before bringing a lawsuit, and to wait before suing until
22 a federal agency denies the claim, or until the claim is deemed denied by the passage of six
23 months. 28 U.S.C. §2675(a). The tort claim requirement is jurisdictional and cannot be waived.
24 *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992).

25 Blake has not complied with the tort claims requirements of the Federal Tort Claims Act
26 because he has failed to file a tort claim. Toole Decl. at ¶4. Also, he has not sued the United
27 States, which is the only proper defendant in a Federal Tort Claims Act case. *Aviles-Diaz v.*
28 *United States*, 194 F. Supp. 2d 85, 86 (D. P.R. 2002). And Blake has neither sued nor served any

1 individual federal defendants. *See Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988).

2 Finally, the Court has subject matter jurisdiction to review a final agency action under the
3 Administrative Procedures Act, 5 U.S.C. §§ 702, 704, or to order a federal official to perform a
4 nondiscretionary ministerial duty owed to a plaintiff under the Mandamus statute, 28 U.S.C. §
5 1361; *Kildare v. Saenz*, 325 F.3d 1078, 1084-85 (9th Cir. 2003) . Blake has not alleged facts that
6 would suggest that the Court has jurisdiction to order equitable relief under either of these
7 statutes, or that he has exhausted administrative remedies to seek judicial review under the APA.
8 Furthermore, the issuance of a passport involves the discretion of the Secretary of State, see 22
9 U.S.C. 211a & 213; 22 CFR 51.8(b), 51.20, 51.23, 51.28(c), 51.70; & *Perkins v. Elg*, 207 U.S.
10 325, 349-350 (1939), and cannot be compelled by mandamus.

11 Blake's general request for money damages from the United States, and his demand that
12 the State Department issue him a passport, do not provide this Court with a basis for subject
13 matter jurisdiction. The Court should dismiss Blake's complaint.

14 **III. THE COURT SHOULD DISMISS BLAKE'S COMPLAINT FOR FAILURE TO**
15 **STATE A CLAIM.**

16 Blake's complaint provides the Court with no cognizable claim. Blake complains that the
17 State Department has not issued him a passport, and that he feels he is entitled to one. But the
18 Department of State, which has the sole authority to issue United States passports, 22 U.S.C.
19 211a, is vested with a discretionary function, not a ministerial one. Because of the legal
20 significance of a passport as a travel document showing the bearer's origin, identity, and
21 nationality, see 8 U.S.C. 1101(a)(30), the burden is on the applicant to establish each of the
22 elements or facts required for passport eligibility. *See* 22 C.F.R. part 51 and provisions cited
23 *supra*; *see also Reyes v. Neely*, 264 F.2d 673 (5th Cir. 1973). Plaintiff alleges no such facts. As
24 the Bankruptcy Court noted in *In re: Walker*, 276 B.R. 568, 569 (W.D. Tex. 2002), the State
25 Department has the discretion to refuse to issue a passport for various reasons, and the courts do
26 not properly second-guess them unless they are unconstitutional.

27 Blake's request for monetary damages likewise presents no cognizable claim. Blake
28 states that he was held for three months in a federal detention center, and that he was subjected to

1 "errors" made by federal employees "overseas." The fact that Blake was incarcerated is not by
2 itself actionable, and the allegation that Blake was injured by "errors" committed overseas does
3 not state a claim for damages unless (1) Blake shows that he has complied with the tort claims
4 requirements, which he has not, and (2) Blake shows that the tort did not occur overseas, since
5 such torts are not covered by the Federal Tort Claims Act under 28 U.S.C. § 2680(k).

6 The Court should find that Blake has failed to state a claim upon which relief can be
7 granted.

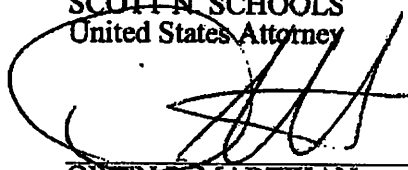
8 **CONCLUSION**

9 The Court should dismiss this case. Blake has made further progress in this case
10 impossible by failing to provide the Court or parties with his address. He has failed to allege a
11 basis for this Court's jurisdiction, and he has failed to state a cognizable claim.

12 Respectfully submitted,

13 SCOTT N. SCHOOLS
14 United States Attorney

15 Dated: May 15, 2007

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17 OWEN P. MARTIKAN
18 Assistant United States Attorney
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15 UNITED STATES DEPT. OF STATE,
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17 Defendants.

FILED

07 MAY 15 PM 12: 59

RICHARD W. WILKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

17
2
Case No. C 07-0543 MJJ

DECLARATION OF JENNIFER
TOOLE SUPPORTING DEFENDANT
UNITED STATES DEPT. OF STATE'S
MOTION TO DISMISS

Date: Tuesday, June 19, 2007
Time: 9:30am
Cttn: 11, 19th Floor

DECLARATION OF JENNIFER TOOLE

I, Jennifer Toole, do hereby declare and state the following:

1. I am an Attorney-Adviser for the United States Department of State's Office of the Legal Adviser, Office of International Claims and Investment Disputes, where I am responsible for reviewing tort claims submitted against the Department. I have been employed in this capacity since January of 2006, and I have been employed by the Department of State since June 2000.

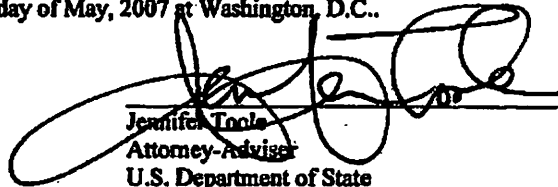
2. I have access to the various databases and files concerning administrative claims filed under the Federal Tort Claims Act, which are maintained by the Department of State in the ordinary course of business.

3. I was asked by the United States Attorney's Office in the Northern District of California to search the available Department of State records to determine whether Adam Blake ("Plaintiff"), or Plaintiff's aliases, Christopher Barry Mussenden or Idris Bilal Jibreel, filed any administrative claims under the Federal Tort Claims Act against the Department.

4. I searched all available records and found that there is no evidence that Plaintiff has filed an administrative claim under the Federal Tort Claims Act.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed this 10th day of May, 2007 at Washington, D.C..

A handwritten signature in black ink, appearing to read "Jennifer Toole", is written over a horizontal line.

Jennifer Toole
Attorney-Adviser
U.S. Department of State
Office of the Legal Adviser
Office of International Claims
and Investment Disputes